



February 13, 2024

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: IRS. REG-107423-23

Dear Secretary Yellen:

Citizens for Responsible Energy Solutions (CRES) Forum submits the following comments in response to the request and notice by the Internal Revenue Service (IRS) for the Section 45X tax credit, as noticed by the Treasury in Federal Register notice 88 FR 86844.

CRES Forum is a 501(c)(3) non-profit organization founded in 2017 to educate Republican policymakers and the public about responsible, conservative solutions to address our nation's energy, economic and environmental security while increasing America's competitive edge. Our goal is to lower global emissions through U.S. policymaking to maintain a clean environment and mitigate the impacts of climate change.

Section 45X of the Internal Revenue Code (IRC) (26 U.S. Code § 45X) provides an advanced manufacturing production credit to domestic manufacturers of applicable clean energy components. Currently, the United States relies heavily on foreign manufacturers for these components and resources, including adversarial countries like Russia and China. Establishing a robust domestic supply chain requires avoiding dependence on foreign sources for the necessary supplies and improved opportunities and investment in U.S. sourced materials and equipment. Growing our domestic manufacturing capacity for these strategically valuable resources not only serves to bolster U.S. economic strength but also national security. The codification of Section 45X attempts to address such concerns by ensuring that to receive the tax credit, a manufacturer must produce the identified qualifying components in the United States. The tax credit thus has been correlated to a rapid increase in domestic manufacturing project announcements, which could potentially allow the American domestic clean energy economy to remain competitive.

AMBIGUITIES IN THE GUIDANCE

Definitions: Section 45X, as originally outlined in the Inflation Reduction Act (P.L. 117–169), prompted a need for clarification regarding the definition of “production” and the eligibility of geographical locations. The Treasury’s proposed guidance (2023) aimed to bring clarity to these aspects but fell short in several key areas.

CRES Forum requests clarification on:

- 1. The Origin of Inputs:** The guidance underscores that eligible components must be manufactured in the United States or territories of the U.S., while the origin of inputs is of lesser importance. The proposed regulations (§ 1.45X–1(d)(2)) clarify that the domestic production prerequisite does not extend to constituent elements, materials and subcomponents utilized in the manufacturing process of eligible components.
- 2. Eligible Timelines:** In terms of implementation timelines, the guidance suggests that to receive the tax credit, eligible components must be produced in 2023 or later, but production may have started before 2023 if the component is completed in 2023. The tax credits for solar, wind and storage components will phase out after 2029, with reductions in rates starting in 2030 and no credits available for components sold post 2032. Companies can benefit from the full credit until 2030, after which a phased reduction of 25 percent annually will take effect, leading to complete cessation after 2032. Getting the necessary permits and approvals to open a mine in the United States can potentially take decades. Notably, tax credits for processing critical minerals remain permanent, offering a continuous incentive beyond the specified timeframe.
- 3. Calculating credit:** Unlike fixed-amount credits, the proposed regulations specifically exclude costs associated with obtaining raw materials, emphasizing a focus on capitalized costs (outlined under U.S. Code § 263A) covering labor, electricity, storage, depreciation, amortization, recycling and overheads. Raw material costs are deliberately excluded to ensure that mere material purchases do not qualify for credit, underscoring the importance of value-adding activities in the production process. Furthermore, transportation and post-production work costs for eligible components or critical minerals are not factored into the tax credit calculation. However, manufacturers have the option to include storage-related expenses, as well as costs for labor, electricity, depreciation and overhead associated with the production of eligible components or minerals.
- 4. Critical minerals:** The guidance further defines eligibility for critical minerals as follows: (a) graphite must be at least 99.9 percent carbon by mass, and (b) aluminum, both high-purity aluminum and commercial-grade aluminum, should be at least 99.7 percent aluminum by mass. However, it specifies that commodity-grade aluminum must be produced directly from certain forms of aluminum and sold on international commodity exchanges. The regulation excludes secondary production of ‘commodity-grade aluminum’ (as per IRS guidance) to simplify verification and eligibility for tax credits under Section 45X.

The tax credit calculation for critical minerals and electrode active materials distinguishes itself from other section 45X credits by being contingent on ten percent of the taxpayer's production costs. The regulation explicitly omits certain costs from the credit calculation, including direct or indirect material costs and expenses related to acquiring raw materials, material conversion, purification, recycling and other material-related production expenses. The primary goal is ostensibly to credit production costs that enhance the value of the applicable critical mineral, preventing multiple credits for the same costs. The exclusion of material costs could also mitigate the risk of crediting identical costs in scenarios where one taxpayer sells the mineral to another for further production. The regulation emphasizes that merely purchasing raw materials is not considered a value-adding activity.

WHERE THE GUIDANCE FALLS SHORT

The guidance on the 45X tax credit appears to fall short in incentivizing and strengthening local critical mineral and electrode active mining and related advanced manufacturing capacity. This shortfall is attributed to the exclusion of raw material costs from the credit calculation and a lack of specificity or restrictions on where these materials can be imported from. Consequently, companies and taxpayers engaged in critical mineral production may not welcome the exclusion of costs related to the domestic extraction or acquisition of raw materials.

The Advanced Manufacturing Production Credit, established through the Inflation Reduction Act (IRA), has been enacted into law. The IRS 45X tax guidance introduced new definitions, such as "substantive transformation" as production qualifiers, is criticized for its vagueness and deviation from the statutory definitions included in the IRA, raising concerns about its apparent conflict with the enacted statutes. Furthermore, taxpayers anticipating a credit based on production costs may find the exclusion of direct and indirect material costs impactful, considering the term was previously undefined. The provided guidance appears to exhibit inconsistencies with the statutory framework, potentially impeding the seamless and effective implementation of the tax credit.

The tax credit is intended to serve as a crucial catalyst, motivating producers, investors and taxpayers to channel their efforts into domestic manufacturing. However, 45X does less to regulate the import of minerals and inputs, undermining the goal for a supply chain free from dominance by Chinese or other inefficient markets. In its current form, the guidance proposed for the Section 45X tax credit may not be sufficient to contribute significantly to the development or enhancement of local critical mineral capacity. This raises questions about the tax credit's effectiveness in achieving the intended goal of fostering self-reliance in producing essential minerals.

IN CONCLUSION

Increasing U.S. manufacturing independence is critical to bolstering the strength of the domestic clean energy industry, as reliance on imports from foreign producers has meant vulnerabilities in the U.S. supply chain. Dependence on potential adversaries for materials for advanced components that drive our economy will imperil our national security, and Section 45X is intended to strengthen domestic capacity and resilience in clean energy and industrial manufacturing, enabling the United States to maintain its global competitiveness.

CRES Forum encourages Treasury to restore the focus of the guidelines for the Section 45X tax credit to address the original intent of the statute. Please address any questions in regard to these comments to Richard Campbell at rcampbell@cresenergy.com.

Respectfully,



Heather Reams
CRES Forum President